

**United States Department of Labor
Board of Alien Labor Certification Appeals
Washington, D.C. 20001**

Date: December 8, 1997

Case No. 96 INA 337

In the Matter of:

MAMA LUCIA'S RESTAURANT,
Employer

on behalf of

JHON GARCIA,
Alien

Appearance: Jose Pertierra, Esq., Washington, D. C.

Before : Huddleston, Larson, and Neusner
Administrative Law Judges

FREDERICK D. NEUSNER
Administrative Law Judge

DECISION AND ORDER

This case arose from a labor certification application that was filed on behalf of JHON GARCIA (Alien) by MAMA LUCIA'S RESTAURANT (Employer) under § 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a)(5)(A) (the Act), and the regulations promulgated thereunder, 20 CFR Part 656. After the Certifying Officer (CO) of the U.S. Department of Labor at Philadelphia, Pennsylvania, denied the application, Employer requested review pursuant to 20 CFR § 656.26.¹

Statutory Authority. Under § 212(a)(5) of the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor may receive a visa, if the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that (1) there are not sufficient workers who are able, willing, qualified, and available at the time of the application and at the place where the alien is to perform such labor; and (2) the employment of the alien will not

¹The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File (AF), and any written argument of the parties. 20 CFR § 656.27(c).

adversely affect the wages and working conditions of the U.S. workers similarly employed at that time and place. Employers desiring to employ an alien on a permanent basis must demonstrate that the requirements of 20 CFR, Part 656 have been met. These requirements include the responsibility of the Employer to recruit U. S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.²

STATEMENT OF THE CASE

On March 1, 1995, the Employer, which operates a restaurant in Baltimore, Maryland, applied for labor certification for the Alien to fill the position of Cook-Italian Style Food. AF 17. The Job to be performed was described as follows:

Plan menus and cooks Italian style dishes, dinners, desserts and other foods. Prepares meats, soups, sauces, vegetables, and other foods prior to cooking. Seasons and cooks food according to prescribed method. Portions and garnishes food.

AF 17. The Employer's experience requirement was two years of experience in the Job Offered, with the special requirements that the worker must be in good health and that no smoking was permitted on the job premises. Id.³ The job was first classified as Cook, Specialty Foreign Foods, under DOT No. 313.361-030.⁴

Notice of Findings. The Certifying Officer (CO) advised in the Notice of Findings (NOF) issued on June 23, 1995, that certification would be denied subject to rebuttal. AF 11-13.

²Administrative notice is taken of the Dictionary of Occupational Titles, published by the Employment and Training Administration of the U. S. Department of Labor.

³Employer offered \$10.46 per hour for this forty hour a week position from 10:00 AM to 6:00 PM, with \$15.69 for overtime.

⁴DOT No. 313.361-030.**COOK, SPECIALTY, FOREIGN FOOD:**Plans menus and cooks foreign-style dishes, dinners, desserts, and other foods prior to cooking. Seasons and cooks food according to prescribed method. Portions and garnishes food. Serves food to waiters on order. Usually employed in restaurant specializing in foreign cuisine, such as French, Scandinavian, German, Swiss, Italian, Spanish, Hungarian, and Cantonese. May be designated according to type of food specialty prepared as Cook, Chinese-Style Food (hotel & rest.); Cook Italian-Style Food (hotel & rest.); Cook, Kosher-Style Food (hotel & rest.); Cook, Spanish-Style Food (hotel & rest.)

The DOT code had been changed from Cook, Specialty (Foreign Food) No. 313.361-030 to Cook, Specialty, No. 313.361-026,⁵ after the menus submitted by the Employer had been examined, said the CO. The Employer's business, the CO explained, was primarily that of a pizza and sandwich shop. Although the Employer serves dinners, the CO continued, they are extremely limited and none of the listed dinners require a long preparation time. This finding was based on the observation that most of the menu items are pizzas, cold sandwiches, and hot sandwiches such as meatballs, steaks and hamburgers.

Based on this reasoning, the CO concluded that the job requirements exceeded the DOT standards in that the length of the experience required by the Employer was excessive, since the DOT prescribed Specific Vocational Preparation (SVP) for a Cook, Specialty, under DOT No. 313.361-026 was not longer than one year and the Employer's special requirement was for two years. The CO then specified the remedies Employer could pursue to correct its application and rebut the NOF.

Rebuttal. The Employer's rebuttal of May 9, 1996, contended that the designation of "Cook, Specialty, Foreign Food," was more appropriate to this job than "Cook, Specialty" because the food preparation process for its specialty items was more complex and the preparation time was longer than the process described in DOT No. 313.361-026. The Employer contended that achieving the desired taste and flavor required much longer experience in the preparation of spaghetti, lasagna, and stuffed shells with their corresponding Italian sauces, including pizza sauce, tomato sauce, spaghetti sauce, and white sauce. He added that the menu contained two different kinds of appetizers, sausage roll and stromboli, and several kinds of past, including homemade lasagna, homemade manicotti, stuffed shells, and spaghetti and meatballs or sausage. The Employer added that, while it did not serve soup or rice dishes, the menu did offer such chicken entrees as chicken parmesano with spaghetti, rotisserie chicken with baked potato and coleslaw, and chicken salad; and it also offered veal parmesano, seafood combination, and shrimp baskets. The employer expressed the opinion that the minimum experience he reasonably can require for a specialty cook in his restaurant is two years. AF 07-08.

⁵Compare DOT No. 313.361-026 **Cook, Specialty**, Prepares specialty foods, such as fish and chips, tacos, and pasties (Cornish meat pies) according to recipe and specific methods applicable to type of cookery. May serve order to customers at window or counter. May prepare and serve beverages, such as coffee, clam nectar, and fountain drinks. May be required to exercise showmanship in preparation of food, such as flipping pancakes in air to turn or tossing pizza dough in air to lighten texture. May be designated according to food item prepared as Cook, Fish And Chips (hotel & rest.).

Final Determination. The CO's Final Determination of April 11, 1996, denied Certification. AF 03-05. Again addressing the finding that Employer's job requirements were unduly restrictive under 20 CFR § 656.21(b)(2), the CO reviewed Employer's rebuttal argument and evidence and concluded that, in spite of the menu items that the Employer discussed, the specialty foods listed do not correspond to the job duties of a Cook, Specialty Foreign Food, under DOT No. 313.361-030, which requires that the cook be able to prepare a full range of restaurant foods. The CO said

To suggest that the position is a Cook, Specialty, Foreign Food requiring 2 years of experience simply because pasta dishes are served is without merit. A Cook, Specialty Foreign Food, 313.361-030, requiring 2 to 4 years of combined education, training, and experience, would be employed in a restaurant with a wait staff, preparing a full range of Italian specialties, such as appetizers, pastas, soups, rice, polenta, meat dishes (veal, pork, lamb), poultry, fish, vegetables, and desserts. Some examples of these would be roast peppers, prosciutto and melon (appetizers); spaghetti with meatballs, sausage, pesto, or tuna fish (pastas); minestrone, rice and endive, pasta and chick pea, and Italian wedding (soups); rice with tuna, rice with mussels, rice with mushrooms (rice); veal Milanese, saltimbocca (veal slices with prosciutto), sausage with beans/lentils (meat dishes); broccoli with oil and lemon, and artichokes with parmesan cheese (vegetables); zabaglione, babas, and pine nut cookies (desserts).

AF 05. By comparison, said the CO, the foods that Employer mentioned are easily prepared, and their preparation cannot require two to four years of education, training and experience. The CO regarded the vocational preparation time for Employer's menu items as more comparable to that required for the occupation of Cook, Specialty, under DOT No. 313.361-026. For these reasons the CO denied certification in the Final Determination.

Appeal. Employer's request for review of May 9, 1996, again stated the position previously set forth in the rebuttal, adding little beyond a rephrasing of the rebuttal and disagreeing with the CO's interpretation of the DOT entries at issue.

DISCUSSION

20 CFR § 656.21(b)(2) requires that an employer document that the job has been and is being described without unduly restrictive job requirements. At § 656.21(b)(2)(i)(A) the regulation further provides the position's requirements to be those "normally required for the job in the United States" and those defined for the job in the DOT, including the vocational subclasses encompassed by the DOT.

The CO based the denial of certification on the evidence of record and on inferences drawn from these subsections. The Employer's appeal reiterated its contention that the dishes served from its menu require preparation that is sufficiently elaborate to require the training needed for an Italian style Cook under DOT No. 313.361-030. At no point, however, did the Employer suggest its need is for training beyond two years, while the CO's roster of foods clearly sounded more elaborate and was not challenged in this respect by the Employer's appeal.

The Final Determination suggested detailed examples of the more elaborate dishes against which the CO measured the expertise required of an Italian Specialty Cook under the regulations. While the criterion the CO stated in the Final Determination did not discuss and compare in detail the various steps that these two categories of cooks must know and apply, the discussion was sufficient to demonstrate that the CO carefully compared with the steps needed to prepare of the foods Employer serves from its menu in arriving at a conclusion. For these reasons it is found that the CO's conclusion that a shorter period of experience was more appropriate to apply to the class of cook required to prepare the Employer's menu items was based on adequate evidence.

Accordingly, we find the CO's denial of certification was supported by the evidence of record. Consequently, the following order will enter.

ORDER

The Certifying Officer's denial of labor certification is hereby Affirmed.

For the Panel:

FREDERICK D. NEUSNER
Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five, double-spaced, typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition and shall not exceed five, double-spaced, typewritten pages. Upon the granting of the petition the Board may order briefs.

